No. 12,074

IN THE

United States Court of Appeals

For the Ninth Circuit

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation),
Appellant,

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), Owner of the Steamship "Frej",
Appellee.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

PART I.

(1) THE EFFECT OF THE AGREEMENT OF JULY 26, 1947.

Frode strongly urges its rights under the agreement of July 26, 1947.[1] (Exhibit "C", Apostles On Appeal, page 52.)

Under that agreement *both* parties reserved *all* their rights. In order to determine what those rights were,

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[1]Paragraph 6 of that agreement reads as follows:
"6. The carrying on of the cargo and/or this agreement shall in no way prejudice any right or rights which either party now has and shall not affect the present status quo of the purported abandonment of the voyage at San Francisco, California."

the facts upon which the agreement was based should be briefly restated.

On June 6, 1947, Rice Growers filed its libel. The Frej was seized and remained in the custody of the marshal until August 9, 1947.

On June 19, 1947 (at a time when it not only was clear that the Frej was capable of being repaired, but when she was in fact undergoing repairs) Frode sent out a writing purporting to abandon the voyage.

On July 17, 1947, Rice Growers amended its libel to claim additional damages in the amount of ninety-five thousand ($95,000.00) dollars for breach of contract by reason of the purported abandonment.

The ship and cargo were thus at loggerheads. The ship contended that it had abandoned and would not proceed on its voyage. The cargo contended that the ship could not lawfully abandon the voyage; that the ship could and should proceed to destination. This much is certain: the Frej was capable of being repaired and she was repaired within a reasonable time. She was capable of carrying her original cargo on to its original destination and she did carry it there within a reasonable time.

The effect of the agreement was that (1) the sound cargo was carried to destination by the Frej, and (2) Frode received ten thousand ($10,000.00) dollars to which it was not entitled, and (3) Frode secured the dismissal of the cause of action for ninety-five thousand ($95,000.00) dollars for breach of contract and (4) Rice Growers avoided the necessity of spending ninety-five thousand ($95,000.00) dollars to forward

the sound cargo and then suing Frode to recover that amount, and (5) the payment of storage and extra handling charges at San Francisco was arranged subject to ultimate Court adjudication, and (6) each party reserved its rights and contentions against the other.

The agreement was entered into on July 26, 1947 (nine days after the filing of the action for breach of contract and one day after the filing of the limitation proceeding).

Rice Growers reserved the right to contend and does contend that Frode could not and did not in fact abandon the voyage.

We pointed out on page 21 of our opening brief that the limitation proceeding was initiated by Frode, not by Rice Growers, and that Frode is the party who seeks equitable relief. We contended then, as we contend now, that the trial Court should have inquired and that this Court should inquire as to whether the conduct of Frode is such as to entitle it to the aid of a Court. We further contended that Frode, having deliberately breached its contract, should not be allowed to take advantage of that deliberate wrong and that, as a Court of equity, this Honorable Court should either deny Frode the right to invoke the limitation of liability statute and the benefits attached thereto or allow Frode to seek limitation *only* upon the condition that Frode do equity by posting a bond based upon the value of the Frej at the lawful end of her voyage in Havana. In support of our position, we cited the following cases:

Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U. S. 207, 47 S. Ct. 357, 71 L. ed. 612;

Rice Growers Association of California v. Rederiaktiebolaget Frode (1948), 171 Fed. (2d) 662;

The Salvore, 1930 A.M.C. 23, 36 F. (2d) 712.

Since Frode makes no reply thereto and does not discuss those cases it must be assumed that that contention cannot be answered.

Under that equitable doctrine, the notice of abandonment of June 19, 1947, should be considered as wholly without validity and force. The reservation of rights in the agreement of July 26 is only as good as the notice of abandonment of June 19, 1947, for if there was no lawful abandonment on June 19, 1947, there were no rights for Frode to reserve. Accordingly, the case must be viewed from the standpoint of what the parties did, as distinguished from what Frode said and attempted to do by its abortive notice of abandonment on June 19, 1947: since the Frej was repaired and reloaded and went on to her original destination, we have the simple case of a vessel arriving at her agreed destination (Havana) and completing her *voyage.* This is the unit or period of time for which the valuation is to be made under the limitation of liability statute. See *Place v. Norwich and New York Transportation Co.,* 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134.

(2) FOR LIMITATION OF LIABILITY PURPOSES THE VESSEL MUST BE VALUED AT THE LAWFUL END OF THE VOYAGE. THE VOYAGE IN QUESTION ENDED IN HAVANA ON SEPTEMBER 18, 1947.

Frode cites *The Maine,* 28 F. S. 578 for the proposition that the right of a shipowner to limit his liability is wholly statutory. Whether or not it is statutory is not the issue in this case.

Frode cites *The Lara,* 1947 A.M.C. 27, (a District Court case,) for the proposition that a ship owner can terminate a voyage prior to destination and invoke the limitation of liability statute at that time. *The Lara completed her voyage.* Some time after the completion of her voyage, limitation proceedings were instituted. Therefore, the language quoted by Frode is *obiter dictum.* It is wholly unsupported by any authority and is in fact directly contrary to the holding of the Supreme Court in the *Place case,* supra, and *The Maggie Hammond v. Morland,* 9 Wall. 435, 19 L. ed. 772.

The *Place* case after stating:

> "The *voyage* defines the limits and boundary of the *casus,* or case, to which the law is to be applied", (30 L. ed. at p. 143)

points out that

> "And this was manifestly the maritime law, for by that law the abandonment of the ship and freight (when not lost) was the remedy of the owners to acquit themselves of liability; and, of course, *this could only be done at the termination of the* voyage * * *" (30 L. ed. at p. 143) (italics added).

Predicated upon the foregoing language, the Court held that the statute contemplated only one measure of liability.

In our opening brief, we cited *The Maggie Hammond v. Morland,* 9 Wall. 435, 19 L. ed. 772, and *Assicurazioni Generali v. SS. Bessie Morris Co.* (1892) 1 Q. B. 571, as authority for the proposition that a ship owner has the *duty* to refit and repair and complete the voyage *if he can.*

Frode has simply not answered that argument. There is no answer to that argument. The ship owner does have a duty when he enters into a contract with a cargo owner and he has no more right to repudiate his contract than anyone else has.

Therefore Frode relies upon the District Court decision of *The Lara* as against the Supreme Court decisions of the *Place* case and *The Maggie Hammond* case and the English rule enunciated in the *Assicurazioni* case.

Frode has cited the Circuit Court decision in *La Bourgogne,* 139 Fed. 433, (affirmed 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973). The Bourgogne was in a shuttle service between Le Havre and New York. On a trip from New York to Le Havre she collided with another ship and sank. Limitation proceedings were instituted and her owner surrendered to a trustee the sum of one hundred ($100) dollars, the value of the articles saved from the wreck. The question arose as to what freight money should also have been surrendered. The ship contended that it should only surrender the freight for the voyage from New York to Le Havre,

whereas the claimants contended that the freight from Le Havre to New York should also be surrendered as well as an annual subsidy from the French government. The Court held in favor of the ship. If the opinion of the Circuit Court of Appeals is to be deemed to still be in effect, La Bourgogne should be cited in favor of Rice Growers and not Frode, because it holds that the *Court must look at the over-all picture in determining what the voyage actually is.*

At page 14, Frode states that if the Frej had sunk after leaving San Francisco for Havana on August 11, 1947, Rice Growers would be the first to maintain that the voyage had ended on June 19. This is no argument, but, if it calls for an answer, the answer simply is that, had the Frej sunk on her way to Havana, Frode would have been the first one to maintain that the voyage had *not* ended on June 19, but had ended by the sinking of the vessel.

Neither the Congress in enacting the limitation statute nor the Supreme Court in construing it in the *Place* case, conceived of a shipowner acting otherwise than in fulfilment of his contracts. The rule is the same in all cases whether the ship be surrendered or a bond be put up in lieu thereof. In all cases a ship either can complete her voyage and does so, or cannot complete her voyage and does not do so. If a ship completes her voyage, the surrender of the ship or the bond will be predicated upon the same time and place and the same value. If a ship cannot complete her voyage and is *legally* excused, the surrender of the ship or the bond will likewise be predicated upon the same time and place and the same value. It is only

where the ship owner deliberately breaches its contract and seeks to profit by its own wrong that two standards are attempted to be submitted to the Court. Such is the case here. Frode *could* complete the voyage and in fact *did* so, yet it contends that its bilateral agreement with Rice Growers could be terminated by unilateral action and that, as a wrongdoer who deliberately breached its contract, it can claim the benefit of the limitation statute and can place before the Court a double measure or standard of liability, although the *Place* case held that that could not be done.

Frode claims (on page 17) that it could have surrendered the ship and its freight to a trustee "thereby terminating any voyage that the vessel may be on". As we have just demonstrated, Frode wholly misconceives the statute and wholly ignores the rule of the *Place* case which makes the voyage the unit.

Courts are more impressed by what people do than by what they say. If the purported abandonment of June 19, 1947, were valid and Frode *really* thought so, why did Frode carry the original cargo on for a mere ten thousand ($10,000.00) dollars when it could have secured another one hundred thousand ($100,000.00) dollars for doing the same thing?

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(3) THERE WAS NEITHER CONSTRUCTIVE TOTAL LOSS NOR FRUSTRATION OF THE VOYAGE.

Frode contends (page 19 to page 26, inclusive, of its brief) that it was justified in abandoning the voyage of the Frej on or before June 19, 1947, for the

reason that the Frej had become a constructive total loss, and that her voyage had been frustrated within the meaning of the Wildwood and The Absaroka.

In support thereof, Frode cites the following American and English *insurance* cases:

Jeffcott v. Aetna Insurance Company, 129 F. (2d) 582;

Marcardier v. The Chesapeake Insurance Co., 3 L. ed. 481;

Fuller v. McCall, 1 L. ed. 356;

Macbeth & Co., Limited v. Maritime Insurance Company, Limited (1908), A. C. 144.

In insurance cases, the Courts have prescribed a formula or percentage rule with which to determine the cases in which it would be unreasonable to require the shipowner to repair. The shipowner is not obligated to claim from his underwriter for a constructive total loss even though the damage be in excess of such percentage, but has the option to do so upon surrendering the vessel to the underwriters.

In a cargo case (between a shipowner and a cargo owner) the rule is as enunciated in *Assicurazioni Generali v. the Steamship Bessie Morris Co.* (1892), 1 Q. B. 571, that by virtue of the contract of carriage the law imposes on the shipowner the duty to proceed on his voyage whenever the expense of repairing the ship is "not greater than the value of the ship and freight when repaired sufficiently to complete the voyage". To the same effect see *The Maggie Hammond v. Morland,* 9 Wall 435, 19 L. ed. 772.

In this case, the ship was repaired and proceeded. Therefore, there was no constructive total loss. The following language from the decision of the Court of Appeal in *The Assicurazioni Generali* case demonstrates that Frode cannot contend for a constructive total loss in this case:

> "Perhaps the shipowner might have been justified in treating the ship as incapable of being repaired *but he did not do so.* It is absurd to argue that the shipowner can say that he was prevented from fulfilling his contract by perils of the sea by reason of the great expense of repairing, when he did in fact repair and proceed upon a voyage. Here, therefore, the completion of the voyage was not prevented by the perils of the sea and the abandonment of the contract was unjustifiable * * *" (VII Aspinall's Reports (N.S.) 217 at p. 219.) (Italics added.)

In this case, as in the *Assicurazioni Generali* case, the shipowner is making the "absurd" contention that it did not do and could not do what in fact it did. It is submitted that this Court should disregard that contention and hold, as the Court of Appeal held in the *Assicurazioni Generali* case, that:

> "If the shipowner acts upon the view that it is possible to repair the vessel and proceed, it is then clear that it is not impossible to do so, and *it becomes absurd to discuss the question of constructive total loss* * * *" (VII Aspinall's Reports (N.S.) 217 at p. 218.) (Italics added.)

Frode also cites the *Kronprinzessin Cecelie,* 244 U. S. 12, 13 S. Ct. 490, 61 L. ed. 960. That case, like the *Absaroka* and the *Wildwood* which were reviewed

in our opening brief involved the frustration of a voyage because of increased war perils and is accordingly completely distinguishable from our case.

Finally, Frode cites *The Louise,* 58 Fed. Sup. 445, 1945 A.M.C. 363. This was an action by cargo owners for the recovery of prepaid freight. The Louise sailed in unseaworthy condition and was forced to return to port for repairs thereby being guilty of a deviation. The cargo owners then promptly reshipped their cargo to avoid further loss without giving the shipowner a full opportunity to repair. The Court held that, under the circumstances of the case, the *cargo owners* were justified in assuming that the voyage had been frustrated and were accordingly entitled to recover the prepaid freight, notwithstanding the fact that the bills of lading contained a "ship lost or not lost" clause.

PART II.

The cases cited by Rice Growers hold that the gross pending freight must be surrendered, and that no deductions of any sort can be made by a shipowner for the expenses incident to earning that freight.

The Steel Inventor, 36 Fed. (2d) 399;
In re W. E. Hedger Co., Inc., 59 Fed. (2d) 982;
The Jane Grey, 99 Fed. 582.

Frode admits that pending freight (that which is earned, vessel lost or not lost), must be included in the limitation fund.

Frode seeks to distinguish its position and contends for surrender of less than the gross pending freight

by claiming that: (1) under the bills of lading only the charges for transportation are includable, (2) the period of the voyage for the purpose of determining the amount of pending freight is from ship's tackle to ship's tackle, and (3), by their nature charges other than transportation are not includable in the gross pending freight. The contentions will be discussed in order.

(1) $101,977.03 is the gross pending freight earned for the voyage.

Bill of Lading No. 1 has on its face the following:[2]

					FREIGHT
1,014,250$	@	.92¢	per 100 lbs.	$	9,331.10
LANDING FEE	@	.05¢	per 100 LBS. ~~per 2000 lbs~~	$	507.13
MANIFEST FEE ~~ft~~ in.	@	$1.00 B/L	per cub. ft.	$	1.00
HANDLING ~~ft~~ in.	@	.40¢	per 2,000# ~~per 40 cubic~~	$	202.85
WHARFAGE	@	.35¢ PER 2000#		$	177.49
				$	
*FREIGHT TO BE PREPAID/~~TO COLLECT~~				$	10,219.57

*(Cross out words not applicable)

All 18 bills of lading are similar. On each Frode named the total at the bottom of the column "freight to be prepaid".

By clause 15 of the bill of lading the prepaid freight is specifically made *earned,* vessel lost or not lost. Accordingly Frode admits the total of $101,977.03 as

[2] "Exhibit A", Apostles on Appeal, p. 62.

freight to be prepaid and earned, vessel lost or not lost. The printed bill of lading must be interpreted most strongly against the party drawing it. The Supreme Court, in *La Bourgogne,* 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973, dealing specifically with the amount of freight to be included in a limitation fund, stated:

> "* * * In view of the decision in *The Maine v. Williams,* 152 U. S. 122, 38 L. ed. 381, 14 S. Ct. 86 * * * the duty to surrender pending freight to entitle to a limitation of liability must be liberally construed against the shipowner * * *" (52 L. ed., at p. 992).

In *The Jane Grey,* 99 Fed. at 592, it is said

> "The owner is required to suffer the entire loss of all that he has invested in the ship and on account of the voyage, and all that he has received for freight and passage money, and all the ship would have earned by completing the voyage; * * *"

In *Ellis v. Atlantic Mutual Insurance Company,* 108 U. S. 342, 2 S. Ct. 746, 27 L. ed. 747, cited by Frode,[3] a shipowner libelled for freight. Though not a limitation case, the Court *included* in the amount of freight the cost of compressing and baling the cotton cargo (a charge much further removed from the "transportation" than those here in question).

In re Wright, Fed. case 18066 (1878), cited by Frode,[4] was a District Court decision in 1878. No

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[3]Appellee's Opening Brief, p. 29.
[4]Appellee's Opening Brief, pp. 31, 33.

facts are given in the reported decision from which the language quoted by Frode can be viewed in support of Frode's position. Because of the clear language supported by reported facts in later decisions *In re Wright* must be considered as overruled, or as having been decided on facts not similar to the later decisions and the litigation before this Court.

(2) The freight surrendered into the limitation fund cannot be limited by the "tackle to tackle" carriage.

Frode attempts to impose the tackle to tackle definition of the Carriage of Goods By Sea Act as the period to be used in determining the amount of freight to be surrendered. That definition has nothing to do with limitation of liability. Moreover, clause 1 of the bill of lading[5] issued by Frode specifies that said Act "shall govern *before* the goods are loaded on and *after* they are discharged from the ship, and *throughout the entire time that the goods are in the custody of the Carrier.*" Notwithstanding this clear language Frode now, *contrary to its own contract,* attempts to prevail upon the Court for aid in not disgorging the *full freight which was earned, vessel lost or not lost.* The position is untenable, and the cases cited by Frode do not support its position.

Frode ignores the facts in *La Bourgogne,* 139 Fed. 433,[6] and ignores the decision of the Supreme Court in the same case. Rice Growers herein distinguished the facts in *La Bourgogne.*[7] Damage claimants con-

[5]"Exhibit A", Apostles on Appeal, p. 62.
[6]Appellee's Opening Brief, pp. 32, 36.
[7]Supra, p. 6.

tended that an annual subsidy, as well as passage money from New York to Le Havre and Le Havre to New York should be surrendered. It was held that only passage money from New York to Le Havre (the voyage in question) should be included.

In *Ralli v. N. Y. & T. SS. Co.,* 154 Fed. 286, relied upon by Frode,[8] cotton was shipped from Texas to Belgium, with transshipment at New York. The lighter used to transfer the cargo at New York careened and sank, causing cargo damage. The lighter owner, in defense to the action by cargo interests, pleaded the Harter Act and sought limitation of liability. The Court considered the questions: (1) the applicability of the Harter Act, and (2) the amount of "pending freight" to make up the limitation fund, and dealt with them separately.

The language quoted by Frode[9] is that part of the opinion expressly considering the Harter Act and merely holding that a shipowner cannot invoke the Harter Act until the vessel breaks ground. Regarding the amount of "pending freight" the Court held that limitation was sought only as owner of the lighter, that the lighter was the *vessel* in question and that only freight attributable to the lighterage could be included in the limitation fund. The question of what items made up "freight pending" was not considered.

Frode also cites *The Pelotas,* 21 Fed. (2d) 236,[10] a case involving the question of whether a shipowner is

[8]Appellee's Opening Brief, pp. 33, 34, 36.
[9]Appellee's Opening Brief, p. 34.
[10]Appellee's Opening Brief, p. 35.

entitled to limit his liability for a collision which in fact occurred *after* the end of the voyage. The case has nothing to do with freight or limitation.

From *The Jane Grey* it is clear that it is not "the tackle to tackle carriage" which determines the amount of freight in a limitation fund and that there is no right "to subtract from the freight then pending the amount of their expenditures in sending the vessel on her voyage." (99 Fed. at 592.)

(3) By the nature of the "charges in question" they all must be included in the limitation fund.

It is necessary that the gross earnings of the SS. Frej (not merely the "net profit") from the venture be surrendered. Frode must surrender the prepaid freight which under the bills of lading was not to be returned in case the voyage was not completed. 3 *Benedict on Admiralty* 454; *The Maine v. Williams,* 152 U. S. 122, 14 S. C. 486, 38 L. ed. 381; *Pacific Coast v. Reynolds* (9 CCA), 114 F. 877.

To deal with the items specifically:

Havana handling fee: In the bill of lading this was labelled "landing fee".[11] Frode contends that the Havana handling fees were terminal charges payable by cargo "for receiving and delivering the cargo *after* the cargo has left the custody of the vessel".[12] There is no evidence before the Court to support this statement. It is naive to consider this item as representing

[11]Supra, p. 12.
[12]Appellee's Opening Brief, p. 29.

anything other than charges paid by Frode incident to unloading the Frej. What handling charges could there be that the ship would pay Havana terminal authorities *after* the cargo was landed on the dock? The question answers itself. Charges against the cargo *after* it has left the custody of the carrier would be billed to and paid by cargo, not the carrier.

Manifest fee: Frode admits[13] this to be a charge for services by Frode. It is clearly incident to the earning of freight. Frode's contention that Clause 14 of the bill of lading applies to this item is untenable. The clause comes into effect only with respect to expenses and penalties not contemplated by the parties.

Handling charges at San Francisco: These are admitted to have been stevedoring charges.[14] Such charges are held in *The Jane Grey* to be a part of the "freight then pending". Frode has not contested the holding of *The Jane Grey.*

Wharfage at San Francisco:[15] There is no evidence before this Court that this sum has been turned over *in toto,* or otherwise to anyone. Whether or not the accounting has been made, however, is immaterial. A portion of the freight money was undoubtedly turned over to members of the crew of the SS. Frej as wages, or spent to purchase fuel oil for the voyage. The mere fact that wharfage charges in San Francisco were not a "net profit" item to Frode does not make them deductible from the limitation fund.

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[13]Appellee's Opening Brief, p. 29.
[14]Appellee's Opening Brief, p. 30.
[15]Appellee's Opening Brief, p. 30.

Frode mentions *"Pacific Coast v. Reynolds,* 114 F. 877", frequently.[16] *Pacific Coast Co. v. Reynolds* definitely supports the position of Rice Growers and is cited in decisions cited by Rice Growers. The *Reynolds* case involved the amount of freight and passage fares to be included in a limitation fund. Freight and passage fares were both prepaid. However, the freight *was not earned, vessel lost or not lost,* under the bill of lading. For *this reason* the Court held that the freight, not being earned, was not pending and the Court did not include the gross freight in the limitation fund. The Court specifically refused to consider whether the items making up the gross freight were properly regarded as freight. On the other hand, where *passage money was specifically* (by the terms of the tickets) *earned, vessel lost or not lost,* the Court held that the complete passage money must be placed in the limitation fund, and that the expenses of ultimately earning the passage money were not deductible. In 1939 this Honorable Court, speaking through Judge Denman in *Hazel Brashear v. Union Dredging Co.,* 1939 A.M.C. 944, 104 Fed. (2d) 762, clearly recognized that "pending freight" was the "gross earnings of the dredge without deductions of any kind". The language, of a case where freight was *not* "earned, vessel lost or not lost" cannot be cited with respect to this litigation, for the simple reason that in this case the gross freight *was "earned, vessel lost or not lost", and hence is pending.*

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[16]Appellee's Opening Brief, p. 27; quotation, p. 33.

Whether or not these items were turned over to parties actually doing the work, each item represents nothing more than expenditures by Frode incident to the earning of "gross freight". Frode performed these items in order to earn the gross freight. Such expenses, merely because itemized on the bill of lading, can no more be deducted from the gross freight surrendered into the limitation fund than (as in the language of *The Jane Grey*) the wages of the captain and crew, the cost of supplies for the vessel, commissions to ship's agents, or stevedoring charges.

CONCLUSION.

For the foregoing reasons, the order should be reversed and the limitation fund fixed at $392,982.03, as stated in our opening brief.

Dated, San Francisco, California,
April 18, 1949.

Respectfully submitted,
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